

**IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA**

KARL WRAY PAUL,

Petitioner,

CASE NO.: 2012-CA-16812- O

WRIT NO.: 12-81

v.

**STATE OF FLORIDA, DEPARTMENT
OF HIGHWAY SAFETY AND MOTOR
VEHICLES, DIVISION OF DRIVER
LICENSES,**

Respondent.

Petition for Writ of Certiorari
from the Florida Department of
Highway Safety and Motor Vehicles,
Mary Varnadore, Hearing Officer.

David Katz, Esquire,
for Petitioner.

Kimberly A. Gibbs, Assistant General Counsel,
for Respondent.

BEFORE THORPE, MIHOK, GRINCEWICZ , JJ.

PER CURIAM.

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner, Karl Wray Paul (“Paul”), timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles’ (“Department”) Final Order of License Suspension. Pursuant to section 322.2615, Florida Statutes, the order sustained the suspension of his driver’s license for refusing to submit to a breath test. This Court has jurisdiction under section 322.2615(13), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(3). We dispense with oral argument. Fla. R. App. P. 9.320.

Findings of Fact

As gathered from the hearing officer's findings, the Arrest Affidavit, and other related documents provided at the formal review hearing held on September 6, 2012, the facts were as follows: On August 3, 2012, Officer Ryan Quinn with the Maitland Police Department while on patrol at the intersection of Maitland Avenue and State Road 414 observed a vehicle across from him at the intersection facing northbound jerk to a stop with approximately a car's length before the stop bar. When the traffic light cycled to green, Officer Quinn crossed the intersection, made a U-turn, and then fell behind the vehicle that was still waiting at the intersection. Officer Quinn then ran a check of the vehicle's tag and received information that the tag was expired. Officer Quinn then observed the vehicle begin to roll forward and jerk to a stop at least twice, before the light cycled to green. He then followed the vehicle as it crossed over the intersection heading northbound. The vehicle's passenger's tires crossed over the center line, causing the vehicle to travel in two lanes as it passed the entrance to Lookout Place. The vehicle repeated this driving pattern as it passed the intersection of Stone Hill Drive. At that point, Officer Quinn activated his patrol vehicle's emergency lights to initiate the traffic stop. The vehicle then came to a complete stop at the intersection of Maitland Avenue and Oakwood Drive.

Upon making the traffic stop, the driver and sole occupant of the vehicle was identified as Paul. While speaking with Paul, the officer observed that Paul's eyes were red and glassy, there was an odor of alcohol coming from the vehicle, and Paul had difficulty retrieving his vehicle registration and proof of insurance. Officer Ryan Knight, also with the Maitland Police Department, then arrived in the scene. At that point, Office Quinn asked Paul to exit the vehicle. While standing outside of his vehicle, Officer Quinn observed that Paul still exhibited red and

glassy eyes and there was a strong odor of alcoholic impurities emanating from his breath. Also, Paul admitted that he consumed three beers.

Officer Quinn then explained to Paul his concerns for his level of impairment and requested that he perform the field sobriety exercises. Paul stated that he lived just down the road, requested Officer Quinn to follow him to his house, and then asked what would happen if he refused to perform the exercises. Officer Quinn explained to Paul that if he refused to perform the exercises he would have to base his decision on what he had observed so far. Officer Quinn also informed Paul that that his refusal to perform the exercises could be used against him in court. Officer Quinn again asked Paul to perform the exercises. Paul refused to perform the exercises and was arrested and transported to the John E. Polk Correctional Facility in Seminole County. At the facility, Officer Quinn read Paul the Implied Consent Warning and requested that he provide breath samples. Paul refused to submit to the breath test and his license was suspended for one year.

Standard of Review

“The duty of the circuit court on a certiorari review of an administrative agency is limited to three components: Whether procedural due process was followed; whether there was a departure from the essential requirements of law; and whether the administrative findings and judgment were supported by competent substantial evidence.” *Dep’t of Highway Safety & Motor Vehicles v. Satter*, 643 So. 2d 692, 695 (Fla. 5th DCA 1994). “It is neither the function nor the prerogative of a circuit judge to reweigh evidence and make findings [of fact] when [undertaking] a review of a decision of an administrative forum.” *Dep’t of Highway Safety & Motor Vehicles v. Allen*, 539 So. 2d 20, 21 (Fla. 5th DCA 1989).

In a formal review of an administrative suspension, the burden of proof is on the State, through the Department. Where the driver's license was suspended for refusing to submit to a breath, blood, or urine test, the hearing officer must find that the following elements have been established by a preponderance of the evidence:

1. Whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances.
2. Whether the person whose license was suspended refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.
3. Whether the person whose license was suspended was told that if he or she refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months.

§ 322.2615(7)(b), Fla. Stat. (2012).

Arguments

In the Petition for Writ of Certiorari, Paul argues that the hearing officer's decision to sustain his license suspension did not follow the essential requirements of the law and was not supported by competent substantial evidence because: 1) The Arrest Affidavit was fatally defective due to an attesting signature that gave no indication whether the attestor was a notary public or a law enforcement officer and failed to indicate how the attestor knew the person swearing to, or affirming, the document and 2) Officer Quinn was acting outside of his jurisdiction when he stopped and arrested Paul for DUI.

Conversely, the Department argues that the hearing officer adhered to the essential requirements of the law and competent substantial evidence in the record supports the hearing officer's decision to sustain Paul's license suspension.

Analysis

Argument I - The Defective Arrest Affidavit

Paul's issue with Officer Quinn's Arrest Affidavit pertains to the "Sworn to and subscribed before me" ("attestor") section in the bottom left hand corner on pages 1 through 3 of the Affidavit. In this section of the Affidavit, on the signature line is written "KAZ LPD 715" and there is no printed name below the signature line. Also, none of the other fields (Notary Public, Law Enforcement or Corrections Officer, Personally Known, Produced Identification, and Type of Identification) are marked and there is no notary seal. The only field completed is the date of August 3, 2012. Lastly, no one testified at the formal review hearing so there was no testimony to clarify: 1) whether "KAZ" are initials for a person's name and if so, for whom; 2) whether "LPD" are initials for an agency or something else; 3) whether this person was a notary, law enforcement officer, or corrections officer; 4) whether the number "715" was a badge number or something else; or 5) whether adequate identification was provided by Officer Quinn or that the attestor personally knew him. Paul's counsel argued this issue at the hearing and the hearing officer reserved ruling on the motion. Thereafter, in the hearing officer's final order she denied the motion stating that "the Longwood Police Officer can be identified by his badge number". She did not provide any basis in her order as to how she determined that the attestor was a Longwood Police Officer.

Section 322.2616(3), Florida Statutes (2012), requires that the affidavit setting forth the grounds for the license suspension must be submitted to the Department by the law enforcement officer. The statute does not state that an acknowledgment may be submitted in lieu of an affidavit. An acknowledgement is when a person merely declares that he executed and signed the document, but an affidavit requires that a person swearing before the notary must under oath

assert that the facts set forth in the document are true. See *Pina v. Simon-Pina*, 544 So. 2d 1161, 1162 (Fla. 5th DCA 1989). As continuously held by the courts, “[w]here an affidavit is called for, an acknowledgment will not suffice.” *Pina* at 1162, citing to *Hammond v. Eastmoore*, 513 So. 2d 770 (Fla. 5th DCA 1987); *McGibney v. Smith*, 511 So. 2d 1083 (Fla. 5th DCA 1987). Also, section 117.10, Florida Statutes (2012), provides that law enforcement officers are permitted to administer oaths when engaged in the performance of official duties. Therefore, the question centers on whether the evidence provided to the hearing officer, but without testimony, confirms that the Arrest Affidavit was sworn to before a proper notary or another law enforcement officer or corrections officer as required by law.

Because the hearing officer did not provide any basis in her order as to how she determined that the attesor was a Longwood Police Officer. This Court can only assume that she interpreted “LPD” to mean the Longwood Police Department. Although the Longwood Police Department is located in Seminole County, it would be just as possible that a Seminole County law enforcement or corrections officer was the attesor assuming that the Arrest Affidavit was completed at the John E. Polk Correctional Facility in Seminole County where Paul was transported to. Because only assumptions, not testimony, were available to the hearing officer to determine whether the Arrest Affidavit was properly sworn to, this Court finds that Paul’s argument has merit.

While formalities as to the submission of evidence are relaxed in the context of an administrative hearing, in this case there was no competent evidence such as testimony to clarify who the attesor was and to confirm that the Arrest Affidavit was properly sworn and executed before someone with the authority to administer an oath. To reach a conclusion as the hearing officer did, assumptions need to be stacked upon assumptions and as this Circuit has previously

held, such stacking of assumptions to develop competent substantial evidence is not permissible. *Genemaras v. Dep't of Highway Safety & Motor Vehicles*, 20 Fla. L. Weekly Supp. 34a (Fla. 9th Cir. Ct. 2012) (granting petitioner's motion for rehearing as to his first argument and holding that competent substantial evidence was lacking because the probable cause affidavit and breath test affidavit contained illegible and incomplete information as to identity of the attesting officer and no clarifying testimony was given).

The Department in its Response cites *Gupton v. Department of Highway Safety & Motor Vehicles*, 987 So. 2d 737 (Fla. 5th DCA 2008). While *Gupton* holds that failure to indicate that the attester was a notary or a law enforcement officer does not render an affidavit facially invalid, this Court concurs with Paul in his Reply that *Gupton* is distinguishable from the instant case. In *Gupton*, unlike in this case, the attester indicated that the affiant was personally known to him. Also, the opinion in *Gupton* is silent as to whether the attester's signature was illegible and unidentifiable and silent as to whether testimony or other evidence was presented to confirm the attester's validity. Accordingly, in this case, unlike in *Gupton*, the omissions in the Arrest Affidavit were not minor technical defects. When, as in this case, there is an issue concerning the officer's identity, the defect can be relevant. *Genemaras* at 20 Fla. L. Weekly Supp. 34a; *see Messer v. Dep't of Highway Safety & Motor Vehicles*, 3 Fla. L. Weekly Supp. 563b (Fla. 9th Cir. Ct. 1995).

Therefore, the attester section of the Arrest Affidavit, by being blank except for the date and what appears to be initials along with a number, necessitates speculation to fully assess the competency of evidence which neither the hearing officer nor this Court should engage in. From review of the record evidence, the hearing officer was not provided with sufficient evidence at the hearing that she could consider and accept or reject. Had testimony been presented as to the

Arrest Affidavit, it would have been within the hearing officer's discretion to accept or not accept the testimony.

Accordingly, due to the issues with the Arrest Affidavit, the hearing officer's decision to sustain Paul's license suspension was not based on competent substantial evidence. Further, because Paul's first argument is dispositive, this Court finds it unnecessary to address his other argument.

Based upon the foregoing, it is hereby **ORDERED AND ADJUDGED** that Petitioner, Karl Wray Paul's, Petition for Writ of Certiorari is **GRANTED** and the hearing officer's Final Order of License Suspension is **QUASHED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this 22nd day of April, 2013.

/S/_____
JANET C. THORPE
Circuit Court Judge

/S/_____
A. THOMAS MIHOK
Circuit Court Judge

/S/_____
DONALD E. GRINCEWICZ
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **David S. Katz, Esquire**, Katz & Phillips, P.A., 121 S. Orange Avenue, Suite 1420, Orlando, Florida 32801, dkatz@kplegalteam.com and to **Kimberly A. Gibbs, Assistant General Counsel**, Department of Highway Safety and Motor Vehicles, DHSMV-Legal Office, P.O. Box 570066, Orlando, FL 32857, kingibbs@flhsmv.gov on this 23rd day of April, 2013.

/S/_____
Judicial Assistant